No. 146. 27

Brf. of Atty. Gen'l (Richards & Howard) for Appellee.

Office Supreme Court U.S.
FILED
JAN 22 1902
JAMES H. McKENNEY,
Clerk.

Filed Jan. 22, 1902.

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

AMERICAN SCHOOL OF MAGNETIC HEALING and J. H. Kelly, appellants, *v.* I. M. McANULLTY. } No. 146.

BRIEF FOR APPELLEE.

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

AMERICAN SCHOOL OF MAGNETIC HEALING and J. H. Kelly, appellants,
v.
I. M. McANULLTY
No. 146.

BRIEF FOR APPELLEE.

The appeal in this case is based upon the contention, as stated by appellant, that the action of the Postmaster-General, in issuing the order of May 15, 1900, was unwarranted and void, because the statutes under which authority for these proceedings was asserted are violative of the constitutional provisions embraced in the eighth section of Article I of the Constitution, and also violative of the fourth and fifth amendments to the Constitution.

The refusal of the postmaster to deliver mail to the complainants was in obedience to an order of the Postmaster-General (Tr., p. 11).

(Order No. 475.)

POST-OFFICE DEPARTMENT,
Washington, D. C., May 15, 1900.

It having been made to appear to the Postmaster-General, upon evidence satisfactory to

him, that the American School of Magnetic Healing, S. A. Weltmer, president, J. H. Kelly, secretary, and J. A. Kelly, at Nevada, Missouri, are engaged in conducting a scheme or device for obtaining money through the mails by means of false or fraudulent pretenses, representations, and promises, in violation of the act of Congress entitled "An act to amend certain sections of the Revised Statutes relating to lotteries, and for other purposes," approved September 19, 1900:

Now, therefore, by authority vested in him by said act, and by the act of Congress entitled "An act for the suppression of lottery traffic through international and interstate commerce and the postal service, subject to the jurisdiction and laws of the United States," approved March 2, 1895, the Postmaster-General hereby forbids you to pay any postal money order drawn to the order of said concern and persons, and you are hereby directed to inform the remitter of any such postal money order that payment thereof has been forbidden, and that the amount thereof will be returned upon the presentation of a duplicate money order applied for and obtained under the regulations of the Department.

And you are hereby instructed to return all letters, whether registered or not, and other mail matter which shall arrive at your office directed to the said concern and persons, to the postmasters at the offices at which they were originally mailed, to be delivered to the senders thereof, with the word "Fraudulent" plainly written or stamped upon the outside of such

letters or matter; provided, however, that where there is nothing to indicate who are the senders of letters not registered or other matter you are directed in that case to send such letters and matter to the Dead-Letter Office, with the word "Fraudulent" plainly written or stamped thereon, to be disposed of as other dead matter, under the laws and regulations applicable thereto.

CH. EMORY SMITH,
Postmaster-General.

To the POSTMASTER, *Nevada, Missouri.*

Two of the parties mentioned in this order, The American School of Magnetic Healing, a corporation, and J. H. Kelly, secretary, treasurer and general manager of the corporation, filed this bill against the postmaster to enjoin him from complying with the directions in the order. A demurrer was interposed to the bill, sustained, and, complainants declining to plead further, the bill was dismissed. Appeal was taken from that decree.

I.

THE STATUTES, BY VIRTUE OF WHICH THE POSTMASTER-GENERAL ISSUED GENERAL ORDER NO. 475, ARE NOT REPUGNANT TO THE FOURTH AND FIFTH AMENDMENTS TO THE CONSTITUTION.

The clauses of the amendments to the Constitution, claimed by the appellants to have been violated, may be considered together. They are:

> Fourth amendment: The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated.

> Fifth amendment: Nor shall any person be deprived of life, liberty, or property without due process of law.

It will be argued further along in this brief that the questions of constitutional law raised by this bill have been determined in this court. But as it is insisted otherwise, earnestly and with much elaboration of argument and citation, it is advisable to carefully consider whether any guaranteed protection to person and property has been denied or abridged.

The denounced statute is comprehensive. It embraces clauses relating to administrative acts receiving, carrying, and delivering the mails, as well as punitive provisions for offenses committed in those regards. The limitations upon Congress in treating upon these different subjects are also upon different principles. The former come within the enumerated powers of Congress; the latter are restricted by the bill of rights in the amendments.

I will request attention to the statutory provisions:

> SEC. 3929. The Postmaster-General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property, by lot, chance, or drawing of any kind, or that any person or company is conducting any other scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, instruct postmasters at any post-office at which regis-

tered letters arrive directed to any such person or company, or to the agent or representative of such person or company, whether such agent or representative is acting as an individual or as a firm, bank, corporation, or association of any kind, to return all such registered letters to the postmaster at the office at which they were originally mailed, with the word "Fraudulent" plainly written or stamped upon the outside thereof; and all such letters so returned to such postmasters shall be by them returned to the writers thereof, under such regulations as the Postmaster-General may prescribe.

But nothing contained in this section shall be so construed as to authorize any postmaster or other person to open any letter not addressed to himself.

The public advertisement by such person or company so conducting such lottery, gift enterprise, scheme, or device that remittances for the same may be made by registered letters to any other person, firm, bank, corporation, or association named therein shall be held to be prima facie evidence of the existence of said agency by all the parties named therein; but the Postmaster-General shall not be precluded from ascertaining the existence of such agency in any other legal way satisfactory to himself.

SEC. 3. That section four thousand and forty-one of the Revised Statutes be, and the same is hereby, amended to read as follows:

"SEC. 4041. The Postmaster-General may, upon evidence satisfactory to him that any person or company is engaged in conducting any

lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property, by lot, chance, or drawing of any kind, or that any person or company is conducting any other scheme for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, forbid the payment by any postmaster to said person or company of any postal money order drawn to his or its order, or in his or its favor, or to the agent of any such person or company, whether such agent is acting as an individual or as a firm, bank, corporation, or association of any kind, and may provide by regulation for the return to the remitters of the sums named in such money orders.

"But this shall not authorize any person to open any letter not addressed to himself."

* * * * *

CHAP. 172. An act to prevent the carrying of obscene literature and articles designed for indecent and immoral use from one State or Territory into another State or Territory.

Be it enacted, etc., That it shall be unlawful for any person to deposit with any express company or other common carrier (1) for carriage from one State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, any obscene, lewd, or lascivious book, pamphlet, picture, paper, letter, writing, print, or other matter of indecent character, or any article or thing designed or intended for the prevention of conception or procuring of abortion, or any written or printed card, letter,

circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, how, or of whom, or by what means any of the hereinbefore mentioned articles, matters or things may be obtained or made; and any person who shall knowingly deposit, or cause to be deposited, with any express company or other common carrier for carriage from one State or Territory of the United States or the District of Columbia, to any other State or Territory of the United States or the District of Columbia, or who shall take from such express company or other common carrier with intent to sell, distribute, or circulate any matter or thing herein forbidden to be deposited for carriage, shall for each offense, upon conviction thereof be fined not more than five thousand dollars or imprisoned at hard labor not more than five years, or both, at the discretion of the court. (February 8, 1897.)

CHAP. 1039. An act amendatory of "An act relating to postal crimes and amendatory of the statutes therein mentioned," approved June eighteenth, eighteen hundred and eighty-eight, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the last clause of the second section of "An act relating to postal crimes, and amendatory of the statutes therein mentioned," approved June eighteenth, eighteen hundred and eighty-eight, be, and the same is hereby, so amended as to read as follows, and constitute the third section of said act:

"SEC. 3. That all matter otherwise mailable by law, upon the envelope or outside cover or

wrapper of which, or any postal card upon which, any delineations, epithets, terms, or language of an indecent, lewd, lascivious, obscene, libelous, scurrilous, defamatory, or threatening character, or calculated by the terms or manner or style of display and obviously intended to reflect injuriously upon the character or conduct of another may be written or printed, or otherwise impressed or apparent, are hereby declared nonmailable matter, and shall not be conveyed in the mails, nor delivered from any post-office nor by any letter carrier, and shall be withdrawn from the mails under such regulations as the Postmaster-General shall prescribe; and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be nonmailable matter, and any person who shall knowingly take the same or cause the same to be taken from the mails, for the purpose of circulating or disposing of, or of aiding in the circulation or disposition of the same, shall, for each and every offense, upon conviction thereof, be fined not more than five thousand dollars, or imprisoned at hard labor not more than five years, or both, at the discretion of the court."

SEC. 2. That section thirty-eight hundred and ninety-three of the Revised Statutes, as amended by the act of July twelfth, eighteen hundred and seventy-six, is hereby so amended as to read as follows:

"SEC. 3893. Every obscene, lewd, or lascivious book, pamphlet, picture, paper, letter,

writing, print, or other publication of an indecent character, and every article or thing designed or intended for the prevention of conception or procuring of abortion, and every article or thing intended or adapted for an indecent or immoral use, and every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where or how, or of whom, or by what means any of the hereinbefore-mentioned matters, articles, or things may be obtained or made, whether sealed as first-class matter or not, are hereby declared to be nonmailable matter, and shall not be conveyed in the mails nor delivered from any post-office nor by any letter carrier; and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be nonmailable matter, and any person who shall knowingly take the same, or cause the same to be taken, from the mails for the purpose of circulating or disposing of, or of aiding in the circulation or disposition of the same, shall, for each and every offense, be fined upon conviction thereof not more than five thousand dollars, or imprisonment at hard labor not more than five years, or both, at the discretion of the court. And all offenses committed under the section of which this is amendatory prior to the approval of this act may be prosecuted and punished under the same in the same manner and with the same effect as if this act had not been passed: *Provided*, That nothing in this act shall

authorize any person to open any letter or sealed matter of the first class not addressed to himself."

Approved, September 26, 1888.

SEC. 3929. The Postmaster-General may, upon evidence satisfactory to him that any person is engaged in conducting any fraudulent lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property, by lot, chance, or drawing of any kind, or in conducting any other scheme or device for obtaining money through the mails by means of false or fraudulent pretenses, representations, or promises, instruct postmasters at any post-offices at which registered letters arrive directed to any such person to return all such registered letters to the postmasters at the offices at which they were originally mailed, with the word "Fraudulent" plainly written or stamped upon the outside of such letters; and all such letters so returned to such postmasters shall be by them returned to the writers thereof, under such regulations as the Postmaster-General may prescribe. But nothing contained in this title shall be so construed as to authorize any postmaster or other person to open any letter not addressed to himself.

SEC. 3894. No letter or circular concerning (*illegal*)—by careful amendment—lotteries, so-called gift-concerts, or other similar enterprises, offering prizes, or concerning schemes devised and intended to deceive and defraud the public for the purpose of obtaining money under false pretenses, shall be carried in the mail. Any person who shall knowingly deposit or send

anything to be conveyed by mail in violation of this section shall be punishable by a fine of not more than five hundred dollars nor less than one hundred dollars, with costs of prosecution.

SEC. 3893. [*No obscene, lewd, or lascivious book, pamphlet, picture, paper, print, or other publication of an indecent character, or any article or thing designed or intended for the prevention of conception or procuring of abortion, nor any article or thing intended or adapted for any indecent or immoral use or nature, nor any written or printed card, circular, book, pamphlet, advertisement, or notice of any kind, giving information, directly or indirectly, where, or how, or of whom, or by what means either of the things before mentioned may be obtained or made, nor any letter upon the envelope of which, or postal card upon which indecent or scurrilous epithets may be written or printed, shall be carried in the mail; and any person who shall knowingly deposit or cause to be deposited for mailing or delivery any of the hereinbefore-mentioned articles or things, or any notice or paper containing any advertisement relating to the aforesaid articles or things, and any person who, in pursuance of any plan or scheme for disposing of any of the hereinbefore-mentioned articles or things, shall take, or cause to be taken, from the mail any such letter or package, shall be deemed guilty of a misdemeanor, and shall, for every offense, be fined not less than one hundred dollars nor more than five thousand dollars, or imprisoned at hard labor not less than one year nor more than ten years, or both.*] (Thus amended.) [Every obscene,

lewd, or lascivious book, pamphlet, picture, paper, writing, print, or other publication of an indecent character, and every article or thing designed or intended for the prevention of conception or procuring of abortion, and every article or thing intended or adapted for any indecent or immoral use, and every written or printed card, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or of whom, or by what means, any of the hereinbefore-mentioned matters, articles, or things may be obtained or made, and every letter upon the envelope of which, or postal card upon which indecent, lewd, obscene, or lascivious delineations, epithets, terms, or language may be written or printed, are hereby declared to be nonmailable matter, and shall not be conveyed in the mails, nor delivered from any post-office nor by any letter carrier; and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be nonmailable matter, and any person who shall knowingly take the same, or cause the same to be taken, from the mails, for the purpose of circulating or disposing of, or of aiding the circulation or disposition of the same, shall be deemed guilty of a misdemeanor, and shall for each and every offense be fined not less than one hundred dollars nor more than five thousand dollars, or imprisoned at hard labor not less than one year nor more than ten years, or both, at the discretion of the court

And all offenses committed under said original section thirty-eight hundred and ninety-three of the Revised Statutes prior to the approval of this act may be prosecuted and punished under the said original section in the same manner and with the same effect as if this act had not been passed.] (See sec. 1785.)

CHAP 393. An act to punish dealers and pretended dealers in counterfeit money and other fraudulent devices for using the United States mails

Be it enacted, &c., That section fifty-four hundred and eighty of the Revised Statutes be, and the same is hereby, so amended as to read as follows:

SEC. 5480. If any person having devised or intending to devise any scheme or artifice to defraud, or to sell, dispose of, loan, exchange, alter, give away, or distribute, supply, or furnish, or procure for unlawful use any counterfeit or spurious coin, bank notes, paper money, or any obligation or security of the United States, or of any State, Territory, municipality, company, corporation, or person, or anything represented to be or intimated or held out to be such counterfeit or spurious articles, or any scheme or artifice to obtain money by or through correspondence, by what is commonly called the "sawdust swindle" or "counterfeit-money fraud," or by dealing or pretending to deal in what is commonly called "green articles," "green coin," "bills," "paper goods," "spurious Treasury notes," "United States goods," "green cigars," or any other names or terms intended to be understood as relating to such

counterfeit or spurious articles, to be effected by either opening or intending to open correspondence or communication with any person, whether resident within or outside the United States, by means of the post-office establishment of the United States, or by inciting such other person or any person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice, or attempting so to do, place or cause to be placed, any letter, packet, writing, circular, pamphlet, or advertisement in any post-office, branch post-office, or street or hotel letter box of the United States, to be sent or delivered by the said post-office establishment, or shall take or receive any such therefrom, such person so misusing the post-office establishment shall, upon conviction, be punishable by a fine of not more than five hundred dollars and by imprisonment for not more than eighteen months, or by both such punishments, at the discretion of the court.

"The indictment, inclination, or complaint may severally charge offenses to the number of three, when committed within the same six calendar months, but the court thereupon shall give a single sentence, and shall proportion the punishment especially to the degree in which the abuse of the post-office establishment enters as an instrument into such fraudulent scheme and device."

SEC. 5480. If any person having devised or intending to devise any scheme or artifice to defraud, or be affected by either opening or

intending to open correspondence or communication with any other person, whether resident within or outside of the United States, by means of the post-office establishment of the United States, or by inciting such other person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice, or attempting so to do, place any letter or packet in any post-office of the United States, or take or receive any therefrom, such person, so misusing the post-office establishment, shall be punishable by a fine of not more than five hundred dollars, and by imprisonment of not more than eighteen months, or by both such punishments. The indictment, information, or complaint may severally charge offenses to the number of three, when committed within the same six calendar months; but the court thereupon shall give a single sentence, and shall proportion the punishment especially to the degree in which the abuse of the post-office establishment enters as an instrument into such fraudulent scheme and device.

These legislative provisions, amended and enlarged from time to time, all making for morality and the well-being of the people, are evincive of a determination to prevent the use of the mails for immoral, corrupting, and fraudulent practices. Whatever may or might be stated in the titles of the different acts, as whether for the suppression of lotteries, or the obstruction to the dissemination of obscene books and pictures, or the hinderance to the schemes and devices for obtain-

ing money or property by means of fraudulent pretenses and representations, is of no vital importance. The material thing is that Congress says you shall not use my instrumentalities to do what is settled by universal sentiment to be a wrong. That Congress can say this is indisputable, unless, in the exercise of its power, it infringes some natural or guaranteed right of person or property. It is not necessary—indeed, it would be illogical—to make any distinction in these statutes. They all rest upon the same principles and the same authority. Broadly, it is here asserted, Congress has the power, with the only limitations above stated, to determine what shall be received and carried and delivered in the mails, and what shall be refused from reception, carriage, or delivery.

This being so—and this seems to be conceded in the able argument of counsel for appellants—what constitutional right has been denied to the complainants here? For I do not understand the sweeping assertion to be made that a statute attempting to distinguish mailable from unmailable matter by the character of what is offered for transmission and delivery is unconstitutional. Nor do I understand it is claimed that a statute distinguishing mailable from unmailable matter by the character of the person to whom it is addressed is unconstitutional. The argument, passing by the power of regulation of postal affairs by Congress, is that these statutes authorize searches for and seizure of property arbitrarily and without warrant, and deprive persons of property and property rights without due process of law.

These statutes show a growth in the determination and the means adopted to prevent the use of the mails for immoral, corrupting, and fraudulent practices. They are not infringements of any freedom or privilege of the citizen. Not a strenuous word of Magna Charta or of any subsequent declarations, born from the loins of resistance to despotism, has been lost sight of. The courts have always restricted rather than extended the language in interpretation. Thus in *United States* v. *Smith* (11 Fed. Rep., 663) it is said, speaking of section 3893, that coarse or unbecoming, or even profane language is not within the inhibition. Under section 3894, *United States* v. *Clark* (22 Fed. Rep., 708), a lottery ticket is not a letter within the statute. Ordering a lottery ticket by letter is not within the statute *United States* v. *Mason* (22 Fed. Rep., 707). These were prosecutions by information or indictment, but the principle alike governs in administrative acts.

The expression of this fourth amendment is peculiar, and shows the great prudence of the authors. It is unreasonable searches and seizures which are forbidden.

Justice Story, in his work on the Constitution, comments thus:

> This provision seems indispensable to the full enjoyment of the rights of personal security, personal liberty, and private property. It is little more than the affirmance of a great constitutional doctrine of the common law. And its introduction into the amendments was doubtless occasioned by the strong

sensibility excited, both in England and America, upon the subject of general warrants almost upon the eve of the American Revolution. Although special warrants upon complaints under oath, stating the crime, and the party by name against whom the accusation is made, are the only legal warrants upon which an arrest can be made according to the law of England, yet a practice had obtained in the secretaries' office ever since the restoration (grounded upon some clauses in the acts for regulating the press) of issuing general warrants to take up, without naming any persons in particular, the authors, printers, and publishers of such obscene or seditious libels as were particularly specified in the warrant. When these acts expired in 1694 the same practice was continued in every reign, and under every administration, except the last four years of Queen Anne's reign, down to the year 1763. The general warrants, so issued, in general terms authorized the officers to apprehend all persons suspected, without naming or describing any person in special.

Against these despotic and tyrannical acts Wilkes and other brave spirits fought and suffered imprisonment and persecution: Erskine at the bar and Chatham at the forum alternately argued and thundered. Temple opened wide his liberal purse; Camden from the bench, disregarding what had been said by other eminent judges, handed down the great decision which neither king nor subordinate officer dared to question or disregard.

Over the water, general warrants were dead. But there were English colonies. There were no steam-propelled vessels, no telegraphs, no personal contact and communication between brothers of the same race and blood. Warrants for libel had been hit in the eye and killed. But in the name of collection of revenue the corpse had been miracled and given new life.

How curious it is to note—not only then but now (for from the crack of morn to the present, times and men are the same)—that the radical mistakes of government are related to the raising of revenue. So what commences as good is turned to bad. And municipalities and states and nations go on to extravagance and greed of controlling individuals, and decay and rot. Necessity is the mother of invention, whether the object be right or evil. The greater the need the more reckless the device. And after while thrones topple, heads fall into the basket, empires are deprived of their valuable possessions, and republics are born.

Judge Cooley, in his treatise upon Constitutional Limitations (sixth ed., p. 365), says:

> The history of this controversy should be read in connection with that in America immediately previous to the American Revolution in regard to writs of assistance issued by the courts to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, and which Otis pronounced "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law that ever was found in

an English law book," since they placed "the liberty of every man in the hands of every petty officer." All these matters are now a long way in the past, but it has not been deemed unwise to repeat in the State constitutions, as well as in the Constitution of the United States, the principles already settled in the common law upon this vital point in civil liberty.

For the service of criminal process the houses of private parties are subject to be broken and entered under circumstances which are fully explained in the works on criminal law, and need not be enumerated here. And there are also cases where search warrants are allowed to be issued, under which an officer may be protected in the like action. But as search warrants are a process exceedingly arbitrary in character, and which ought not to be resorted to except for very urgent and satisfactory reasons, the rules of law which pertain to them are of more than ordinary strictness; and if the party acting under them expects legal protection it is essential that these rules be carefully observed.

The learned author, while condensing the history of search warrants, wanders a little from the logic of the argument by not making the distinction between the acts of one clothed with express authority—that is, carrying an authentic warrant in his hand—and one acting under a general authority, by virtue of his position as a revenue officer. And therefore, while he fairly states *Henderson's Distilled Spirits* (14 Wall., 44), his criticism is hardly sustainable. The Henderson seizure did not

deprive anybody of property except by due process of law.

There can be nothing stronger stated, in determining the rights of the citizen as declared in the fourth and fifth amendments, than is found in the decision and opinion of this court, speaking through Justice Bradley, in *Boyd* v. *United States* (116 U. S., 616).

This was a cause of seizure of 35 cases of plate glass under a revenue act, for the reason of undervaluation. It was thought material and necessary, on the part of the Government, to show the quantity and value of 29 cases of glass previously imported. The importer was required by the district judge to produce the invoice of these goods, which he did under protest. This court decided that was error, because the compulsory production of a party's private books and papers to be used against himself or his property in a criminal or penal proceeding, or for a forfeiture, is within the spirit and meaning of the fourth amendment; and that a statute requiring one to produce his private books and invoices and papers in court, or else the allegations of the Government attorney to be taken as confessed, is unconstitutional and void as applied to suits for penalties, or to establish a forfeiture of the party's goods, as being repugnant to the fourth and fifth amendments.

What was complained of was not the seizure of the goods awaiting an examination, but the compulsion to make evidence, by the party accused of wrongdoing, against himself. There is nothing in the *Distilled Spirits case* (*supra*) irreconcilable with this.

And all the elaborate reasoning of that case is against the contention of these complainants. It certainly can not be disputed that the rights and privileges and immunities which man is entitled to exercise in securing his property have been asserted and protected in this great judgment. The invocation to the police power was not listened to in this court with patience. There are instances where, in eagerness for reform and municipal regulation of censured affairs, acts are committed by overzealous officers which excite the apprehension of thoughtful men. Houses are violently and forcibly entered, arrests made, and searches and seizures had without warrant and without specific charge and designation of person and thing upon which to found a criminal accusation. These things have been tolerated, not excused. They come, at the best, within the degree of the end justifying the means. The only attempt at justification is that they are for the public good

To show the strictness with which rights of personal property are protected by our judges we can quote what this court said in the case above cited:

> It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the fourth amendment to the Constitution, in all cases in which a search and seizure would be: because it is a material ingredient and effects the sole object and purpose of search and seizure.
>
> The principal question, however, remains to be considered. Is a search and seizure, or,

what is equivalent thereto, a compulsory production of a man's private papers, to be used in evidence against him in a proceeding to forfeit his property for alleged fraud against the revenue laws—is such a proceeding for such a purpose an "unreasonable search and seizure" within the meaning of the fourth amendment of the Constitution, or is it a legitimate proceeding? It is contended by the counsel for the Government that it is a legitimate proceeding, sanctioned by long usage, and the authority of judicial decision. No doubt long usage, acquiesced in by the courts, goes a long way to prove that there is some plausible ground or reason for it in the law, or in the historical facts which have imposed a particular construction of the law favorable to such usage. It is a maxim that *consuetudo est optimus interpres legum*, and another maxim that *contemproanea expositio est optima et fortissima in lege*. But we do not find any long usage, or any contemporary construction of the Constitution, which would justify any of the acts of Congress now under consideration. As before stated, the act of 1863 was the first act in this country, and, we might say, either in this country or in England, so far as we have been able to ascertain, which authorized the search and seizure of a man's private papers, or the compulsory production of them, for the purpose of using them in evidence against him in a criminal case, or in a proceeding to enforce the forfeiture of his property. Even the act under which the obnoxious writs of assistance were issued did not go as far as this, but only authorized the

examination of ships and vessels, and persons found therein, for the purpose of finding goods prohibited to be imported or exported, or on which the duties were not paid, and to enter into and search any suspected vaults, cellars, or warehouses for such goods. The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ *toto cœlo*. In the one case, the Government is entitled to the possession of the property; in the other it is not. The seizure of goods forfeited for a breach of the revenue laws or concealed to avoid the duties payable on them has been authorized by English statutes for at least two centuries past, and the like seizures have been authorized by our own revenue acts from the commencement of the Government. The first statute passed by Congress to regulate the collection of duties—the act of July 31, 1789 (1 Stat., 29, 43)—contains provisions to this effect. As this act was passed by the same Congress which proposed for adoption the original amendments to the Constitution, it is clear that the members of that body did not regard searches and seizures of this kind as "unreasonable," and they are not embraced within the prohibition of the amendment. So, also, the supervision authorized to be exercised by officers of the revenue over the manufacture or custody of

excisable articles, and the entries thereof in books required by law to be kept for their inspection, are necessarily excepted out of the category of unreasonable searches and seizures. So, also, the laws which provide for the search of articles and things which it is unlawful for a person to have in his possession for the purpose of issue or disposition, such as counterfeit coin, lottery tickets, implements of gambling, etc., are not within this category. (*Commonwealth* v. *Dana*, 2 Met. (Mass.), 329.) Many other things of this character might be enumerated. The entry upon premises, made by a sheriff or other officer of the law, for the purpose of seizing goods and chattels by virtue of a judicial writ, such as an attachment, a sequestration, or an execution, is not within the prohibition of the fourth or fifth amendment, or any other clause of the Constitution; nor is the examination of a defendant under oath after an ineffectual execution, for the purpose of discovering secreted property or credits to be applied to the payment of a judgment against him, obnoxious to those amendments.

But when examined with care it is manifest that there is a total unlikeness of these official acts and proceedings to that which is now under consideration. In the case of stolen goods, the owner from whom they were stolen is entitled to their possession, and in the case of excisable or dutiable articles the Government has an interest in them for the payment of the duties thereon, and until such duties are paid has a right to keep them under observation, or to pursue and drag them from concealment; and in

> the case of goods seized on attachment or execution, the creditor is entitled to their seizure in satisfaction of his debt; and the examination of a defendant under oath to obtain a discovery of concealed property or credits is a proceeding merely civil to effect the ends of justice, and is no more than what the court of chancery would direct on a bill for discovery. Whereas, by the proceeding now under consideration, the court attempts to extort from the party his private books and papers to make him liable for a penalty or to forfeit his property.

Making the application of these rules to the case presented, what violation of any right has there been by the postmaster at this town or by the execution of the order of the Postmaster-General?

Search involves the idea of something hidden or concealed. That is not here. The carrier must see every letter and packet intrusted to his care. The law inveighed against absolutely forbids any inspection of the contents of the closed missive. No privacy is violated. No exposure is made. No evidence is obtained. The public can not know the correspondence. The prosecuting officer gets no knowledge. There is no seizure at all. There is no forfeiture nor confiscation, not even sequestration.

But the regulation of what may be carried in the mails is another matter. The fallacy of the contention of the complainants is that they should control the matter placed in the mails rather than the Postmaster-General.

II.

The power vested in Congress to establish post-offices and post-roads embraces the regulation of the entire postal system of the country, and Congress may designate what may be carried in the mails and what excluded from them.

In *Ex parte Jackson* (96 U. S., 727), this court, through Justice Field, said:

> The power possessed by Congress embraces the regulation of the entire postal system of the country. The right to designate what shall be carried necessarily involves the right to determine what shall be excluded.
>
> And again:
>
> In excluding various articles from the mail the object of Congress has not been to interfere with the freedom of the press or with any other rights of the people, but to refuse its facilities for the distribution of matter deemed injurious to the public morals.

In re Rapier (143 U. S., 110), Chief Justice Fuller, in announcing the opinion of the court, said:

> The States, before the Union was formed, could establish post-offices and post roads, and in doing so could bring into play the police power in the protection of their citizens from the use of the means so provided for purposes supposed to exert a demoralizing influence upon the people. When the power to establish post-offices and post roads was surrendered to the Congress it was a complete power, and the grant carried with it the right to exercise all

> the powers which made that power effective. It is not necessary that Congress should have the power to deal with crime or immorality within the States in order to maintain that it possesses the power to forbid the use of the mails in aid of the perpetration of crime or immorality.
>
> The freedom of communication is not abridged within the intent and meaning of the constitutional provisions, unless Congress is absolutely destitute of any discretion as to what shall or shall not be carried in the mail, and compelled arbitrarily to assist in the dissemination of matter condemned by its judgment through the governmental agencies which it controls. That that power may be abused furnishes no ground for a denial of its existence, if government is to be maintained at all.

It must, reasonably, be within the power of Congress to confer authority upon the head of the postal department to direct a postmaster to refuse the delivery of letters or the payment of money orders to a person or corporation which, upon evidence *satisfactory to the head of the department*, is found to be engaged in conducting a lottery or any other scheme or device for obtaining money through the mails by means of false or fraudulent pretenses, representations, or promises.

This power Congress has exercised and has clothed the Postmaster-General with it.

Section 396 of the Revised Statutes makes it a duty of the Postmaster-General to instruct all persons in the postal service with reference to their duty, and to

superintend generally the business of the Department and execute all laws relative to the postal service.

Section 3834 requires every postmaster before entering upon the duties of his office to give bond for the faithful discharge of all duties imposed on him, either by law or the rules and regulations of the Department. This section subjects the postmaster to the orders of the Postmaster-General.

Section 3926 authorizes the Postmaster-General to establish a uniform system of registration for the greater security of valuable mail matter. It provides that neither the Post-Office Department nor its revenue shall be liable for loss of any mail matter on account of its having been registered.

Section 4027 authorizes the Postmaster-General to establish and maintain, under such rules and regulations as he may deem expedient, a uniform money-order system at all suitable post-offices, which shall be designated as "money-order offices." This authorization, as expressed in the section, is to promote public convenience and to insure greater security in the transfer of money through the mail, and in the same direction of regulation are the provisions heretofore quoted.

The defendant insists that, in the exercise of his discretion, the Postmaster-General can not be supervised or controlled by the courts.

This precise question was passed upon by the circuit court for the southern division of Ohio in *Enterprise Savings Association* v. *Zumstein* (64 Fed. Rep., 837) Zumstein was the postmaster of the city of Cincinnati, Ohio. The Postmaster-General issued a fraud order

as to the mail of the Enterprise Savings Association and certain of its officers. The association, as in the case at bar, applied for an injunction Mr. Justice Sage, in passing upon the question, said (p. 840):

> No citizen has a vested right to the use of either the registered-letter or postal money-order system. Every citizen has the privilege of both, subject to the discretion which is vested in the Postmaster-General. It is the duty of every postmaster to obey the orders of the Postmaster-General made in pursuance of the statutory provisions above quoted, *and in the exercise of his discretion.* The question then is whether this discretion can be supervised or controlled by Federal courts. It is not a new question. It was first considered in the case of *Marbury* v. *Madison* (1 Cranch, 137). In that case, at page 166, the Supreme Court was of opinion that the President is vested with certain political powers to be exercised in his discretion. Whatever opinion might be entertained of the manner in which that discretion was used, there existed and could exist no power to control it. * * *
>
> In the case now before the court the Postmaster-General was authorized to act upon evidence satisfactory to him. What he did under that authorization can not be regarded as a ministerial act. It was in the exercise of a discretion, and it can not be supervised or controlled by this court.
>
> This case was appealed to the circuit court of appeals for the sixth circuit (67 Fed. Rep., 1000) and affirmed.

Mr. Justice Lurton, circuit judge, in delivering the opinion of the court, said:

> The order (fraud order) was one which the defendant (postmaster) was bound to obey unless the Postmaster-General exceeded his authority in making it. From the order it distinctly appeared that in the judgment of the Postmaster-General the Enterprise Savings Association was conducting a lottery or other similar business through the mails in violation of section 3894, Revised Statute, as amended, and that this fact had "been made to appear to the satisfaction of the Postmaster-General." It must follow from the exclusive and absolute power of Congress over the whole subject of what may be carried and what may be excluded from the mails, that it was entirely within the competency to confer authority upon the head of the postal department to direct a postmaster to refuse the delivery of registered letters addressed to a person or corporation which was engaged in conducting a lottery enterprise through the use of the register letter department, or to forbid the payment of a postal money order drawn in favor of one engaged in conducting such a business by means of the assistance of that department of the post-office, and that he might make such order upon evidence satisfactory to him (pp. 1004, 1005).

Further on the court says:

> The honorable Postmaster-General, when called upon to pass judgment upon the business of this association, may have been somewhat perplexed as to how to deal with a scheme so

> elaborately arranged as to present upon one view of it a legitimate investment business, but which when looked upon from the other side seemed to show many of the features characteristic of a lottery or other like schemes. The settlement of the question undoubtedly involved the exercise of judgment and discretion, and this very fact operates to take his duty out of the mere ministerial class, and therefore beyond the control or review of the judicial department of Government by means of mandamus or injunction (p. 1006).

The Postmaster-General, by virtue of the statute hereinbefore cited, has ample authority to issue the fraud order under which the respondent performed the acts complained of in the bill herein.

The bill in this case shows that complainants introduced evidence before the Postmaster-General as to the character of the American School of Magnetic Healing, and that this evidence being considered, was deemed satisfactory by him to issue the fraud order. The finding of the Postmaster-General on the issue of fact is an act involving the exercise of judgment and discretion. (*Enterprise Savings Association* v. *Zumstein*, 64 Fed., 840.)

It is the settled law that courts will not interfere to control an executive officer in the discharge of a duty involving the exercise of judgment and discretion.

In *Decatur* v. *Paulding* (14 Pet., 515), the relator, Mrs. Decatur, claimed a pension both under act and a resolution of Congress. The Secretary of the Navy ruled adversely to her. She applied for a writ of man-

damus to pay her according to her contention. The court refused the writ, saying:

> If a suit should come before this court which involved the construction of any of these laws, the court certainly would not be bound to adopt the construction given by any head of a department; and, if they supposed his decision to be wrong, they would, of course, so pronounce their judgment. But their construction of a law must be given in a case in which they have jurisdiction, and in which it is their duty to interpret the act of Congress in order to ascertain the rights of the parties in the cause before them. The court could not entertain an appeal from the decision of one of the secretaries, nor reverse his judgment, in any case where the law authorizes him to exercise discretion or judgment; nor can it, by mandamus, act directly upon the officer and guide or control his judgment or discretion in the matters committed to his care in the ordinary discharge of his official duties. * * * The interference of courts with the performance of the ordinary duties of the Executive Department of the Government would be productive of nothing but mischief, and we are quite satisfied that such a power was never intended to be given to them.

In *Gaines* v. *Thompson* (7 Wall., 347) the court, in passing upon an application for an injunction to restrain the Secretary of the Interior, through Mr. Justice Miller, said:

> It may, however, be suggested that the relief sought in all those cases was through the writ

of mandamus, and that the decisions are based upon the special principles applicable to the use of that writ. This is only true so far as these principles assert the general doctrine that an officer to whom public duties are confided by law is not subject to the control of the courts in the exercise of the judgment and discretion which the law reposes in him as a part of his official functions. Certain powers and duties are confided to those officers, and to them alone, and however the courts may, in ascertaining the rights of parties in suits properly before them, pass upon the legality of their acts, after the matter has once passed beyond their control there exists no power in the courts, by any of its processes, to act upon the officer so as to interfere with the exercise of that judgment while the matter is properly before him for action. The doctrine, therefore, is as applicable to the writ of injunction as it is to the writ of mandamus. In the one case the officer is required to abandon his right to exercise his personal judgment, and to substitute that of the court, by performing the act as it commands; in the other he is forbidden to do the act which his judgment and discretion tell him should be done. There can be no difference in the principle which forbids interference with the duties of these officers, whether it be by writ of mandamus or injunction.

Concerning the merits of the case, he said:

The action of the officers of the Land Department, with which we are asked to interfere in this case, is clearly not of this character. The

> validity of plaintiff's entry, which is involved in their decision, is a question which requires the careful consideration and construction of more than one act of Congress. It has been for a long time before the Department, and has received the attention of successive Secretaries of the Interior, and has been found so difficult as to justify those officers in requiring the opinion of the Attorney-General. It is far from being a ministerial act, under any definition given by this court.

In re Rapier (*supra*) the defendants were arrested for a violation of section 3894, Revised Statutes, as amended by act of September 19, 1890, known as the antilottery act. Mr. Chief Justice Fuller (p. 134) says:

> We can not regard the right to operate a lottery as a fundamental right infringed by the legislation in question, nor are we able to see that Congress can be held in its enactment to have abridged the freedom of the press. The circulation of newspapers is not prohibited, but the Government declines itself to become an agent in the circulation of printed matter which it regards as injurious to the people. The freedom of communication is not abridged within the meaning of the constitutional provision, unless Congress is absolutely destitute of any discretion as to what shall or shall not be carried in the mails and compelled arbitrarily to assist in the dissemination of matter condemned by its judgment and through the governmental agencies which it controls.

The language of the court is particularly applicable to the facts in this case. The defendants are charged with having devised a scheme to defraud, and for using the United States mails in furtherance of said scheme. The Postmaster-General, after a full hearing before him, decided that their scheme was a fraudulent one, and under the powers vested in him issued the fraud order. We are at a loss to see in what particular this violates any right granted to the citizen under either the fourth or fifth amendments to the Constitution of the United States.

In *Enterprise Savings Association* v. *Zumstein* (*supra*) the validity of a fraud order issued by the Postmaster-General to the postmaster at Cincinnati, under the act of September 17, 1890, came under consideration. The court says (p. 1006):

> We see no reason why Congress may not confer upon him (Postmaster General) authority to prevent the use of those facilities by any person engaged in using them for the propagation of a business deemed by it vicious, and not entitled to such special facilities in the extension and conduct of such schemes. The authority to inhibit the use of those postal facilities had to be vested somewhere. It was a matter pertaining to executive business, and was therefore imposed upon the executive head of the Postal Department.

In *Hoover* v. *McChesney* (81 Fed. Rep., 472) a fraud order issued by the Postmaster-General under the act of 1895, extending the powers of that officer "to all

letters or other matters sent by mail," was passed upon. The court says (pp. 478–479):

> It is true the circuit court of appeals of this circuit have affirmed the right of the Postmaster-General to exclude the Enterprise Savings Association and the officers of that association from the use of the money orders and registered letters under the authority of the act of 1890. The Postmaster-General had under said act declared that said association was engaged in conducting a lottery or a similar enterprise for the distribution of money or personal property by lot or chance through the mails in violation of the provisions of section 3894, Revised Statutes, as amended; but as this was a corporation presumably organized and conducted for the purpose of carrying on a business which was declared to be nonmailable matter, it may be fairly said that this was a mere mode of excluding postal matter from the mail which was nonmailable. The order of the Postmaster-General, however, under the then law only applied to money orders and the registered mail. Judge Lurton, in delivering the opinion of the court (67 Fed. Rep., 1000), indicated that there may be a difference between the ordinary mail and the postal service by money orders and registered mail, saying:
>
> "Neither of these departments of the postal service are essential to the ordinary use of the mail, and Congress has reposed in the Postmaster-General an unlimited discretion as to when and where he would afford the facilities of this Department. * * *" This decision

> would seem to decide that the order of the 12th of February, 1896, was valid, and authorized the defendant to retain mail matter coming to the Southern Mutual Investment Company and its officers.

The order of February 12, 1896, referred to by the court, referred to all mail, whether registered or not, of the Southern Mutual Investment Company or its officers.

At the October term, 1893, the Pettis County Investment Company filed a bill in equity against H. C. Demuth, the postmaster at Sedalia, seeking an injunction to restrain him from returning letters in compliance with a fraud order issued by the Postmaster-General on August 10, 1893 On the bill and answer his honor, Judge Philips, held that the court had no jurisdiction to review, set aside, or disregard the order of the Postmaster-General of the United States pleaded in the answer.

The assertion that power resides nowhere to prevent transportation of such matter in the mails as Congress shall deem injurious to the morals or safety of the citizen is appalling. The treaty-making power has been assumed to be broad enough to exclude such matter from foreign mail; certainly the power to establish post-offices and post-roads should be equally broad as to the interstate mails.

Does the constitutional guaranty of "right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures," or that "no citizen shall be compelled in any criminal

case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law" override the duty of Congress to purge the mails? These guaranties, in common with all other provisions, are subordinate to the great leading purpose for which the Constitution was ordained, one of which is the promotion of the general welfare and another to form a more perfect union.

JOHN K. RICHARDS,
Solicitor-General.

ROBERT A. HOWARD,
U. S. Special Attorney.

○